## PP v. MOK CHIN FAN & ORS

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ROHANA YUSUF JCA
UMI KALTHUM ABDUL MAJID JCA
[CRIMINAL APPEAL NO: W-09(S)-206, 207, 208 & 209-08-2013]
22 APRIL 2015

***SECURITIES:*** *Securities legislation – Listing requirement – Submission of false financial report to Bursa Malaysia – Providing wrong information in relation to company's financial standing – Whether company's prospectus wrongly impressed public into thinking that company was viable and profitable – Role of respondents in company – Whether offence serious in nature – Whether sentence imposed in tandem with respective roles played by respondents – Whether deterrent sentence ought to be imposed – Securities Industry Act 1983, ss. 122B & 122C – Securities Commission Act 1993, ss. 55(1)(a) & 55(3)*

***CRIMINAL PROCEDURE:*** *Appeal – Appeal against sentence – Submission of false financial report to Bursa Malaysia – Whether company's prospectus wrongly impressed public into thinking that company was viable and profitable – Whether offence serious in nature – Whether sentence imposed in tandem with respective roles played by respondents – Whether deterrent sentence ought to be imposed – Whether appellate intervention warranted – Securities Industry Act 1983, ss. 122B & 122C – Securities Commission Act 1993, ss. 55(1)(a) & 55(3)*

***CRIMINAL PROCEDURE:*** *Sentence – Adequacy of sentence – Submission of false financial report to Bursa Malaysia – Whether gravity of offence taken into consideration – Whether offence serious in nature – Whether sentence imposed in tandem with respective roles played by respondents – Whether deterrent sentence ought to be imposed – Securities Industry Act 1983, ss. 122B & 122C – Securities Commission Act 1993, ss. 55(1)(a) & 55(3)*

The first, second and fourth respondents were directors of Inix Technologies Holdings Bhd ('Inix'), a company listed on the MESDAQ market of Bursa Malaysia through an initial public offering in which RM10.14 million was raised. Prior to that, Inix had issued a prospectus dated 29 July 2005 in which 97.1% of its revenue as reported was found to be false. Inix was required to submit a quarterly financial report to Bursa Malaysia and again, it was discovered that 93.37% of the total sales reported in the four quarters of the financial year were false. It was alleged that the impugned prospectus, which stated fictitious sales, was issued before the listing of Inix and the abovementioned respondents as directors had approved the issuance of the said prospectus. The third respondent, a senior financial executive of Inix, was in charge of the financial matters of the company and had assisted in

A fabricating the fictitious sales as well as the false figures in the financial reports. After the listing, the first, second and fourth respondents had authorised the furnishing of false and misleading statements in Inix Condensed Consolidated Income Statement to Bursa Malaysia in its four quarterly reports. The said three directors were charged with four counts
B under s. 122B(b)(bb) of the Securities Industry Act 1983 ('SIA'). The third respondent was charged under s. 122B(b)(bb) read together with s. 122C of the SIA for abetting the fourth respondent. In relation to the issuance of the prospectus, the first, second and fourth respondents were charged under s. 55(1)(a) of the Securities Commission Act 1993 ('the SCA') and the third
C respondent was charged for abetting the fourth respondent. In the Sessions Court, the respondents pleaded guilty to all the charges against them. For both the charges under the SIA and the SCA, the trial judge imposed fines of RM325,000 in total on the first and second respondents respectively, RM350,000 on the third respondent and RM1.1 million on the fourth respondent. On appeal, the High Court affirmed the sentences imposed by the
D Sessions Court. Dissatisfied, the prosecution appealed to this court alleging that public interest would demand a custodial sentence. It was argued that the sentences imposed on the respondents were manifestly inadequate in the light of the seriousness of the offences and the nature of the breaches committed.

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**Held (allowing appeal)**
**Per Rohana Yusuf JCA delivering the judgment of the court:**

**(1)** The offences committed by the respondents under s. 55 of the SCA and s. 122B of the SIA were serious in nature. An act of manipulating and
F providing wrong information in relation to the company's financial standing, in order to invite investor's participation is a grave offence. On the facts, the false prospectus of Inix had wrongly impressed the public into thinking that the company was viable and profitable. The falsity would translate into presenting a company which suffered a loss of
G RM5.084 million to a company with a profit of RM2.448 million instead (*R v. Kyslant*, refd). (paras 17, 18 & 20)

**(2)** Bursa Malaysia is an exchange holding company, vested with statutory duties and powers to protect investors and to ensure public confidence in the investment environment. The false information furnished to the
H exchange would defeat the objective and stifle Bursa's statutory roles and duties to ensure and maintain a credible and transparent capital market, in order to ensure and maintain investor's confidence. The respondents' act of misrepresenting Bursa Malaysia could not be justified on any reason. (para 22)

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**(3)** The furnishing of false information on the financial standing of Inix went beyond misleading the public. If these offences of deceiving Bursa were not contained, it would eventually be seen to be in cahoots with the respondents, to mislead members of the public on the listed company's financial standing. The Sessions Court ought to have given due regards to the gravity of the offence and not comparing the amount of falsity involved *per se*. Further, the offences committed under s. 122B of the SIA were related to false information made to Bursa Malaysia in four quarterly financial reports immediately after the listing of Inix. (paras 23, 24, 29 & 30)

**(4)** Instead of showing remorse, the respondents perpetuated the crime and continued to display an appalling lack of commercial morality. The respondents had to maintain the fictitious figure in consonant with the figure in the prospectus because if they had shown the real sales figures, it would have driven the investors away from investing in Inix. (paras 31 & 32)

**(5)** The planning and pre-meditation involved in the commission of the crime was an important consideration in determining the sentence. The scheme started with creating false sales figures in the prospectus, which would have aided it for listing. Towards the end, the making of payments to cover up fictitious sales showed that the offences were not committed at the spur of the moment. It was pre-meditated and calculated to deceive the public to part with their monies in the belief that they were making sound investment in a profitable company when in fact the company was making a loss. This was not a case of an error of judgment but a deliberate effort to furnish false information. After the listing was approved, the plan perpetuated with further false reporting to Bursa (*PP v. Loo Chang Hock*; refd). (paras 33 & 34)

**(6)** The sentence imposed must also be in tandem with the respective roles played by the respondents. The first respondent (non-executive director), second respondent (executive director and chief technical officer) and fourth respondent (executive director and chief executive officer) were responsible under the law to ensure correct and accurate information were contained in the prospectus and that the reports to Bursa were accurate. The roles played by the first, second and third respondents had to be distinguished from that of the fourth respondent who had master minded the whole scheme. Though the third respondent was not a director, she was in charge of the financial matters of the company and had assisted to fabricate the fictitious sales as well as the false figures in the financial reports. Directors are not appointed to advance their own interests but to manage the company for the benefit of its shareholders to whom they owed a fiduciary duty. The third

respondent, however, was an employee who had to take instructions from the CEO but she was very much aware of the wrongdoing, and yet participated in the same. (paras 35, 36 & 44)

**(7)** Upon a plain reading of s. 55(3) of the SCA and 122B of the SIA, the court is vested with the necessary discretion to pass sentences of either fines or imprisonment or both as mandated by the provisions, though not necessarily in that order. A deterrent sentence must aim to deter potential offenders by making example of an offender. Further, it is necessary to maintain the integrity of the financial market, which hinges on an accurate and truthful disclosure of information. Having regard to the serious nature of the offence and the need for general deterrence and after striking a balance between public interest and the interests of the respondents, no sentence other than imprisonment would be appropriate. A deterrent sentence should serve as a warning to others not to partake in similar offences. (paras 38, 41, 42 & 43)

**(8)** This court varied the sentence imposed on the respondents pursuant to s. 55(3) of the SCA in the following terms, *ie*, (i) the first, second and third respondents were sentenced to an imprisonment of six months each in addition to the fines imposed by the Sessions Court on each of them; and (ii) the fourth respondent was sentenced to an imprisonment of nine months in addition to the fines imposed by the Sessions Court. On the four charges under s. 122B of the SIA, the sentences were varied in the following terms, *ie*, (a) the first, second and third respondents were sentenced to an imprisonment of six months on each of the charges in addition to the fines imposed by the Sessions Court on each of them; (b) the fourth respondent was sentenced to an imprisonment of nine months in addition to the fines imposed by the Sessions Court on each of the charges; and (c) the sentence of imprisonment for all the four charges shall run concurrently. The imprisonment sentences on the respondents under s. 55 of the SCA and s. 122B of the SIA shall run consecutively. (paras 46-48)

***Bahasa Malaysia*** *Translation Of Headnotes*

Responden-responden pertama, kedua dan keempat merupakan pengarah-pengarah Inix Technologies Holdings Bhd ('Inix'), sebuah syarikat yang disenaraikan dalam pasaran MESDAQ Bursa Malaysia melalui tawaran awam awal di mana wang sebanyak RM10.14 juta dikutip. Didapati bahawa sebelum itu, Inix telah mengeluarkan prospektus bertarikh 29 Julai 2005 di mana 97.1% pendapatannya seperti yang dilaporkan didapati palsu. Satu laporan kewangan suku tahunan Inix telah dikemukakan kepada Bursa Malaysia dan sekali lagi, didapati bahawa 93.37% keseluruhan jualan seperti dilaporkan di dalamnya adalah palsu. Adalah dihujahkan bahawa prospektus

tersebut, yang mencatatkan jualan palsu, telah dikeluarkan sebelum Inix disenaraikan dan pengarah-pengarah yang dinyatakan telah meluluskan pengeluaran prospektus tersebut. Responden ketiga, eksekutif kanan kewangan Inix, bertanggungjawab terhadap perkara-perkara kewangan syarikat dan telah membantu memalsukan jualan yang direkakan dan mencatatkan angka palsu dalam laporan kewangan. Selepas penyenaraian, responden-responden pertama, kedua dan keempat telah meluluskan pemberian kenyataan-kenyataan palsu dan mengelirukan dalam 'Inix Condensed Consolidated Income Statement' kepada Bursa Malaysia dalam laporan-laporan suku tahunannya. Ketiga-tiga pengarah tersebut telah dituduh dengan empat pertuduhan di bawah s. 122B(b)(bb) Akta Perindustrian Sekuriti 1983 ('SIA'). Responden ketiga pula dituduh di bawah s. 122B(b)(bb) dibaca bersama s. 122C SIA kerana bersubahat dengan responden keempat. Berkenaan pengeluaran prospektus, responden-responden pertama, kedua dan keempat dituduh di bawah s. 55(1)(a) Akta Suruhanjaya Sekuriti 1993 ('SCA') dan responden ketiga dituduh kerana bersubahat dengan responden keempat. Di Mahkamah Sesyen, responden-responden telah mengaku salah terhadap kesemua pertuduhan terhadap mereka. Bagi kedua-dua pertuduhan di bawah SIA dan SCA, hakim bicara telah mengenakan hukuman denda sebanyak RM325,000 masing-masing terhadap responden-responden pertama dan kedua, RM350,000 terhadap responden ketiga dan RM1.1 juta terhadap responden keempat. Atas rayuan, Mahkamah Tinggi telah mengesahkan hukuman yang dikenakan oleh Mahkamah Sesyen. Tidak berpuas hati, pihak pendakwaan telah merayu ke mahkamah ini dengan menghujahkan bahawa kepentingan awam menuntut hukuman penjara. Adalah dihujahkan bahawa hukuman yang dikenakan terhadap responden-responden adalah tidak mencukupi berdasarkan keseriusan kesalahan-kesalahan dan sifat pelanggaran yang dilakukan oleh mereka.

**Diputuskan (membenarkan rayuan)**
**Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:**

**(1)** Kesalahan-kesalahan yang dilakukan oleh responden-responden di bawah s. 55 SCA dan s. 122B SIA adalah bersifat serius. Suatu tindakan memanipulasi dan membekalkan maklumat salah berkaitan dengan kedudukan kewangan syarikat, untuk menjemput penyertaan pelabur adalah satu kesalahan yang berat. Berdasarkan fakta, prospektus Inix yang mempunyai maklumat palsu telah memberi gambaran salah kepada orang awam dengan menganggap bahawa syarikat itu berdaya maju dan mengaut keuntungan. Kepalsuan ini menunjukkan suatu syarikat yang telah mengalami kerugian sebanyak RM5.084 juta kepada suatu syarikat yang membuat keuntungan sebanyak RM2.448 juta (*R v. Kyslant*; dirujuk).

**(2)** Bursa Malaysia merupakan suatu syarikat pemegang urusniaga yang diberi tangunggjawab dan kuasa berkanun untuk melindungi pelabur dan memastikan keyakinan orang awam dalam persekitaran pelaburan. Maklumat palsu yang dibekalkan akan mengalahkan objektif dan menyekat peranan berkanun Bursa untuk memastikan dan mengekalkan suatu pasaran modal yang kredibel dan boleh dipercayai, untuk memastikan dan mengekalkan kepercayaan pelabur. Tindakan responden-responden memberi kenyataan salah kepada Bursa Malaysia tidak boleh diwajarkan dalam apa jua keadaan.

**(3)** Maklumat yang dibekalkan mengenai kedudukan kewangan Inix telah mengelirukan orang awam. Jika kesalahan-kesalahan untuk memperdaya Bursa tidak dikawal, ia akan dilihat sebagai bersekongkol dengan responden-responden, untuk mengelirukan orang awam berkenaan kedudukan kewangan syarikat yang tersenarai. Mahkamah Sesyen sepatutnya memberi pertimbangan kepada graviti kesalahan dan tidak membezakan jumlah kepalsuan yang terlibat. Selanjutnya, kesalahan-kesalahan yang dilakukan di bawah s. 122B SIA adalah berkaitan dengan maklumat palsu yang dibuat kepada Bursa Malaysia dalam laporan kewangan suku tahunannya selepas penyenaraian Inix.

**(4)** Tanpa menunjukkan apa-apa penyesalan, responden-responden telah melakukan jenayah ini dan menunjukkan kekurangan moral komersial secara berterusan. Responden-responden terpaksa mengekalkan angka-angka yang palsu sejajar dengan angka dalam prospektus memandangkan pelabur-pelabur tidak akan melabur dalam Inix jika angka jualan sebenar dikemukakan.

**(5)** Perancangan dan persediaan awal yang terlibat dalam melakukan jenayah ini merupakan suatu pertimbangan yang perlu diambil untuk menentukan hukuman. Skima ini bermula dengan menyediakan angka jualan palsu dalam prospektus, yang akan menyokongnya dalam penyenaraian. Akhirnya, bayaran yang dibuat untuk meliputi jualan palsu menunjukkan bahawa kesalahan-kesalahan tidak dibuat secara mendadak. Ia adalah perancangan awalan dan dibuat untuk mengelirukan orang awam melabur dengan kepercayaan bahawa mereka membuat pelaburan yang baik dalam suatu syarikat yang mengaut keuntungan apabila fakta sebenarnya menunjukkan bahawa syarikat tersebut mengalami kerugian. Ini bukan suatu kes kesilapan pendapat tetapi percubaan sengaja untuk membekalkan maklumat palsu. Selepas penyenaraian diluluskan, perancangan diteruskan lagi dengan memberi laporan palsu kepada Bursa (*PP v. Loo Chang Hock*; dirujuk).

**(6)** Hukuman yang dijatuhkan mestilah seiring dengan peranan yang dimainkan oleh responden-responden. Responden pertama (pengarah bukan eksekutif), responden kedua (pengarah eksekutif dan ketua

pegawai teknikal) dan responden keempat (pengarah eksekutif dan ketua pegawai eksekutif) bertanggungjawab di bawah undang-undang untuk memastikan maklumat-maklumat betul dan tepat dinyatakan dalam prospektus dan laporan-laporan yang dikemukakan kepada Bursa adalah tepat. Peranan yang dimainkan oleh responden-responden pertama, kedua dan ketiga perlu dibezakan dengan responden keempat yang merupakan minda perancang kesemua skima tersebut. Walaupun responden ketiga bukanlah seorang pengarah, dia bertanggungjawab dalam hal ehwal kewangan syarikat dan telah membantu untuk memalsukan jualan dan angka palsu dalam laporan kewangan. Pengarah-pengarah tidak dilantik untuk mendahulukan kepentingan mereka tetapi untuk mengurus syarikat bagi kepentingan pemegang sahamnya di mana pengarah-pengarah tersebut mempunyai kewajipan fidusiari terhadap mereka. Responden ketiga, walau bagaimanapun, merupakan pekerja yang terpaksa menerima arahan daripada ketua pegawai eksekutif tetapi mempunyai kesedaran mengenai kesalahan yang berlaku dan masih mengambil bahagian dalam kesalahan tersebut.

**(7)** Menurut s. 55(3) SCA dan s. 122B SIA, mahkamah mempunyai budi bicara untuk menjatuhkan hukuman denda atau penjara atau kedua-duanya seperti diperuntukkan, walaupun bukan dalam susunan tersebut. Hukuman deteren sepatutnya tertumpu untuk menghalang pesalah-pesalah berpotensi dengan menjadikan pesalah sebagai contoh. Selanjutnya adalah penting untuk mengekalkan integriti pasaran kewangan, yang bergantung kepada pengemukaan maklumat-maklumat betul dan tepat. Mengambil kira sifat keseriusan kesalahan dan kehendak deteren secara am dan selepas mempertimbangkan kepentingan orang awam dan kepentingan responden-responden, hukuman penjara adalah lebih berpatutan. Hukuman deteren akan memberi amaran kepada orang lain supaya tidak terlibat dalam kesalahan yang sama.

**(8)** Mahkamah ini telah mengubah hukuman responden-responden di bawah s. 55(3) SCA terhadap responden-responden dalam turutan berikut, iaitu, (i) responden-responden pertama, kedua dan ketiga masing-masing dijatuhkan hukuman penjara enam bulan bersama-sama dengan denda yang dikenakan oleh Mahkamah Sesyen; dan (ii) responden keempat dijatuhkan hukuman penjara sembilan bulan bersama-sama dengan denda yang dikenakan oleh Mahkamah Sesyen. Bagi keempat-empat pertuduhan di bawah s. 122B SIA, hukuman-hukuman diubah seperti berikut, iaitu, (a) responden-responden pertama, kedua dan ketiga masing-masing dijatuhkan hukuman penjara enam bulan bagi pertuduhan-pertuduhan itu bersama-sama dengan denda yang dikenakan oleh Mahkamah Sesyen; (b) responden keempat dijatuhkan hukuman

penjara sembilan bulan bersama-sama dengan denda yang dikenakan oleh Mahkamah Sesyen bagi tiap-tiap pertuduhan; dan (c) hukuman penjara bagi keempat-empat pertuduhan berjalan serentak. Hukuman penjara terhadap responden-responden di bawah s. 55 SCA dan s. 122B SIA diperintahkan untuk berjalan secara berasingan.

**Case(s) referred to:**
*Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC* ***(refd)***
*Gek Sing Kaliappan v. PP [1999] 4 CLJ 292 HC* ***(refd)***
*HKSAR v. Chu Chick Kei & Anor [2013] 5 HKC 21* ***(refd)***
*Leong Kok Huat v. PP [1998] 4 CLJ 106 HC* ***(refd)***
*Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA* ***(refd)***
*Ooi Boon Leong v. PP [2011] MLJU 1104* ***(refd)***
*PP v. Karthiselvan Vengatan [2009] 4 CLJ 632 CA* ***(refd)***
*PP v. Loo Chang Hock [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263 HC* ***(refd)***
*PP v. Loo Choon Fatt [1976] 1 LNS 102 HC* ***(refd)***
*PP v. Murugesan Muniyandi [2011] 8 CLJ 527 CA* ***(refd)***
*PP v. Wang Ziyi Able [2008] 2 SLR 1082* ***(refd)***
*R v. Bishirgian, Howeson and Hardy [1936] 1 All ER 586* ***(refd)***
*R v. Kylsant [1931] All ER Rep 173* ***(refd)***
*R v. Williams [2005] 216 ALR 113* ***(refd)***

**Legislation referred to:**
Securities Commission Act 1993, s. 55(1)(a), (3)
Securities Industry Act 1983, ss. 122B(b)(bb), 122C

*For the appellant - Shanti Geoffrey (Ahsani, Mohd Nasir & Edzuan Ezzady Rossidi with her); DPP*
*For the 1st respondent - K Kumaraendran (Harinderjit Singh with him); M/s Kumar & Co*
*For the 3rd & 4th respondents - Kamarul Hisham Kamaruddin (Ling Yee Siew with him); The Chambers of Kamarul Hisham & Hasnal Rezua*

*Reported by Kumitha Abd Majid*

## JUDGMENT

**Rohana Yusuf JCA:**

**[1]** This is an appeal by the Public Prosecutor who is not satisfied with the sentences imposed by the Sessions Court, which was affirmed by the High Court at Kuala Lumpur on 29 November 2013 on the four above named respondents. The four respondents were charged with four counts under s. 122B(b)(bb) of the Securities Industry Act 1983 (SIA), and one count under s. 55(1)(a) of the Securities Commission Act 1993 (SCA).

**Brief Facts**

**[2]** Briefly, the facts leading to the convictions and sentences were these. Inix Technologies Holdings Bhd (Inix) was listed on the MESDAQ market of Bursa Malaysia on 1 September 2005 through an initial public offering (IPO) in which RM10.14 million was raised. Prior to that, Inix had issued a prospectus dated 29 July 2005, in which 97.1% of its revenue as reported was found to be false. After the listing and as a listed company, Inix was required to submit a quarterly financial report to Bursa Malaysia. Again it was discovered that 93.37% of the total sales reported to Bursa Malaysia in 2006 in the four quarters of the financial year were false.

**[3]** The impugned prospectus was issued before the listing of Inix. The first respondent Mok Chin Fan, the second respondent Cheong Kok Yai and the fourth respondent, Jimmy Tok Soon Guan were directors of Inix who approved the issuance of the prospectus. The third respondent, Normah binti Sapar, who was then the Senior Financial Executive of Inix, assisted in its preparation. The prospectus was said to have stated fictitious sales. Out of the total sales of RM7.7 million represented in it, 97% were fictitious. In relation to the prospectus, the first, second and fourth respondents were charged under s. 55(1)(a) of the SCA and the third respondent was charged for abetting the fourth respondent. The offence carries a maximum sentence of a fine not exceeding RM3 million or to imprisonment for a term not exceeding ten years or to both, as provided under s. 55(3) of SCA.

**[4]** After the listing, the first, second and fourth respondents had authorised the furnishing of false and misleading statements in Inix condensed consolidated income statement to Bursa Malaysia in its four quarterly reports for the financial year ended 31 July 2006. The said three respondent directors were charged with four counts under s. 122B(b)(bb) of the SIA. The third respondent was charged under s. 122B(b)(bb) read together with s. 122C of the SIA for abetting the fourth respondent. The offence is punishable under s. 122B, which carries a maximum sentence of a fine not exceeding RM3 million or to imprisonment for a term not exceeding ten years or to both.

**[5]** All the four respondents pleaded guilty at the Sessions Court, to all the charges against them. The learned Sessions Court Judge imposed fines of RM325,000 in total on the first and second respondents respectively, RM350,000 on the third respondent and RM1.1 million on the fourth respondent. The table as set out in the learned DPP's written submission illustrates the sentences on the respondents, which we produce below for ease of reference:

**Sentences Imposed By Sessions Court And Affirmed By High Court**

| | First Respondent (Mok Chin Fan) | Second Respondent (Cheng Kok Yai) | Third Respondent (Normah Sapar) | Fourth Respondent (Jimmy Tok Soon Guan) |
|---|---|---|---|---|
| **First Charge s. 122B SIA** | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM200,000 (in default 18 months' imprisonment) |
| **Second Charge s. 122B SIA** | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM200,000 (in default 18 months' imprisonment) |
| **Third Charge s. 122B SIA** | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM150,000 (in default 18 months' imprisonment) |
| **Fourth Charge s. 122B SIA** | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM50,000 (in default 6 months' imprisonment) | RM150,000 (in default 12 months' imprisonment) |
| **Fifth Charge s. 55 SCA** | RM125,000 (in default 1 year imprisonment) | RM125,000 (in default 1 year imprisonment) | RM150,000 (in default 1 year imprisonment) | RM400,000 (in default 2 years' imprisonment) |
| **Total Fine** | **RM325,000** | **RM325,000** | **RM350,000** | **RM1,100,000** |

**[6]** Having given our due consideration to the submissions of parties, we agree with the learned DPP that the sentences imposed by the Sessions Court merit our appellate intervention as they do not reflect fairly the seriousness of the offences committed by the respondents. The learned High Court Judge in dismissing the appeal of the Public Prosecutor and affirming the sentences imposed by the Sessions Court had fallen into the same error for the reasons we elaborated in the following paragraphs of our judgment. For convenience therefore, we would be referring to the grounds of judgment of the Sessions Court in our deliberation.

**[7]** We are fully aware of the restraints placed on an appellate court in disturbing the sentences meted out by a trial court. However, in view of the fact that the trial judge did not direct his mind nor gave due consideration to certain material facts, we agree with the learned DPP that the appellate court is duty bound to alter the sentences imposed based on decided authorities in *Public Prosecutor v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256, which was referred to in *Dato' Seri Anwar Ibrahim v. PP* [2002]

3 CLJ 457; [2002] 3 MLJ 193, *PP v. Murugesan Muniyandi* [2011] 8 CLJ 527; [2012] 6 MLJ 805, and *PP v. Karthiselvam Vengatan* [2009] 4 CLJ 632. On the facts of the present appeal we also agree that the sentences are manifestly inadequate.

**Counsel's Argument**

**[8]** Learned DPP, Puan Shanti Geoffrey (Encik Ahsani Mohd Nasir and Encik Edzuan Ezzady Rossidi with her) submitted before us that the sentences imposed on the respondents were manifestly inadequate in the light of the seriousness of the offences and the nature of the breaches committed. Essentially, learned DPP urged this court to impose a deterrent sentence as it would better serve the public interest.

**[9]** Learned DPP urged this court to vary the sentences imposed by the Sessions Court which were affirmed by the High Court for the reasons that the trial judge had given too much weight and emphasis on the plea of guilt but did not consider the gravity of the offences and their implications; failed to take into account the benefits obtained by each respondent in perpetrating the crime; erred in finding that there was no planning and pre-meditation involved in the perpetration of the crime. It was also the contention of the appellant that the trial judge had erred in giving consideration to the input and role of the advisers when there was no proof of the same. Finally, the appellant contended that public interest demands a custodial sentence.

**[10]** For the first respondent, Dato' Kumaraendran (Encik Harinderjit Singh with him) submitted that the sentences imposed were appropriate and that the Sessions Court Judge had balanced the interest of the respondents with that of the public. Learned counsel urged this court to abide by legal authorities and normal practice and this court ought to be slow in disturbing sentences passed by the trial judge, unless they are manifestly excessive or inadequate, or manifestly wrong in the sense of it being illegal.

**[11]** According to learned counsel, the offence under s. 55 of the SCA involving the fictitious sales in the prospectus did not benefit the respondents immediately and personally in view of the one year moratorium imposed against sale of shares held by the promoters. Furthermore, learned counsel suggested that the impact on the public was less in view of the fact that the investors were directors, employees and business associates of Inix who were aware and knew of the status of Inix and hence would place less reliance on the prospectus.

**[12]** In relation to the sentences imposed under s. 122B of the SIA, learned counsel submitted that the four reports made in the four quarterly statements to Bursa Malaysia were unaudited, and they were not for the ultimate consumption of the members of the general public. It was further contended that, the prosecution did not furnish clear evidence on the effect of these consolidated statements on the public and what losses were suffered.

**[13]** It was also learned counsel's submission that the statutory provisions in both ss. 122B and 55(3) favour fines first to be imposed in view of the way the said provisions were drafted. He cited the case of *Leong Kok Huat v. PP* [1998] 4 CLJ 106 to contend on the way to interpret sentencing statute, *viz* that priority be given to what comes first in the legal provision as in this case, fines. Furthermore, both the provisions of the law in the instant appeal do not make custodial sentence mandatory, according to learned counsel.

**[14]** Dato' Kumaraendran contended that to impose a custodial sentence would be out of trend since earlier cases of this nature had only imposed fines (see *PP v. Ng Kim Weng* for Polymate and *Lim Chai Hock* relating to Tat Sang Holdings, (unreported)). Although this court in *Ooi Boon Leong v. Pendakwa Raya* [2011] MLJU 1104 had affirmed a six month custodial sentence for a case under s. 122B, it ought to be distinguished on its facts. Learned counsel submitted that the Sessions Court Judge had correctly done so as shown in his judgment.

**[15]** Learned counsel for the third and fourth respondents, Encik Kamarul Hisyam Kamaruddin (Cik Ling Yee Siew with him) adopted the submission of Dato' Kumaraendran and added that there was no aggravating circumstances in the commission of the offences herein and there was no impact on the public resulting from the false reports, to merit a more severe sentence. The offences committed accordingly ought to be contrasted with market rigging, which is much more severe in nature. As regards the third respondent it was submitted she was a mere abettor.

**[16]** The second respondent was not represented by counsel. He informed this court that he was a mere technical man and was not fully conversant in the running of the business.

**Our Decision**

**[17]** We agree with the learned DPP and we have no doubt that the offences committed by the respondents both under s. 55 of the SCA and s. 122B of the SIA were serious in nature.

**[18]** The importance of accurate prospectus needs no further emphasis. It is well settled that an act of manipulating and providing wrong information on the company's financial standing, in order to invite investors' participation like in the present appeal is a grave offence. This was established as early as in 1932 in the English case of *R v. Kylsant (Lord)* [1931] All ER Rep 179 where a 12-month imprisonment was imposed for disclosing false information in a company's prospectus. The court in that case found the prospectus to be false in material particular when looking at a number of statements made, a false impression on the financial position of the company was conveyed, although each statement taken by itself was true. In another case *(R v. Bishirgian, Howeson and Hardy* [1936] 1 All ER 586), the court

imposed a sentence of 12 and nine months imprisonment respectively for making false statement in a prospectus. The case of *R v. Feld All England Official Transcripts* [1997-2008] demonstrates a point that in determining the sentence, in relation to false prospectus the court gave consideration to the fact that if correct figures were disclosed, members of the public would not have parted with their monies to invest.

**[19]** In the Australian case of *R v. Williams* [2005] 216 ALR 113, the company's CEO was sentenced to an imprisonment for two years. The CEO failed to disclose that the company had entered into an agreement which would not make the company totally risk free. The court in that case took note of the fact the accused was aware of what he had failed to do. Such failure was viewed seriously as it misled the public into believing that their investment would be risk free. The Australian court held further in that case that the responsibility to ensure accuracy of the prospectus rested on the directors.

**[20]** The false prospectus of Inix in this case had wrongly impressed the public into thinking that the company was viable and profitable. The falsity would translate into presenting a company which suffered a loss of RM5.084 million to a company with a profit of RM2.448, million instead. The said three respondent directors in fact made payment of RM2,271,525 in order to cover up the fictitious sales so as to show them as genuine sales.

**[21]** The facts revealed that the respondents benefited from the IPO where the first respondent cashed out RM100,000 the third respondent RM1.37 million and the fourth respondent RM461,000. Besides, the respondent directors also held more than 37% of Inix shares through a company called PCSSB and profited from sales of the shares post listing. With payment of fines, the learned DPP submitted they would each make a gain from the crime committed. In our view this fact is another important consideration in determining the adequacy of the sentences. We were reminded in this instance of the case of *Gek Sing Kaliappan v. PP* [1999] 4 CLJ 292 cited by learned DPP where the late Vincent Ng J observed that "In dispensing justice, magistrates should not be oblivious of the feel of temperature outside their courts and they continue to adopt the same approach in sentencing while (as here) there was laughter in the air outside by certain characters on their way to the bank".

**[22]** In relation to the offence under s. 122B, we take a serious view of the act of misleading an authority, in this case Bursa Malaysia. Bursa Malaysia is an exchange holding company, vested with statutory duties and powers to protect investors and to ensure public confidence in the investment environment. The false information furnished to the exchange would defeat the objective and stifle Bursa's statutory roles and duties to ensure and maintain a credible and transparent capital market, in order to ensure and maintain investors' confidence. The act of misrepresenting Bursa Malaysia by the respondents cannot be justified on any reason.

**[23]** In this regard, the submission of learned counsel for the respondents, that the false report made to Bursa was not for public consumption is totally devoid of merit. In fact, the furnishing of false information on the financial standing of Inix went beyond just misleading the public, it could destroy the whole market confidence which would spell disaster for the economy.

**[24]** If these offences of deceiving Bursa are not contained, eventually Bursa would be seen to be in cahoots with the respondents, to mislead members of the public on the listed company's financial standing. If conducts of this nature are not properly dealt with, eventually public confidence in the regulating body would be eroded.

**[25]** We take notice of how cases of this nature were dealt with in other jurisdictions. In *R v. Williams (supra)* the Supreme Court of New South Wales Australia, viewed the breaches of presenting misleading information to investors as well as the stock exchange seriously, and opined that it should be treated with utmost level of seriousness. In the Hong Kong case of *HKSAR v. Chu Chick Kei & Anor* [2013] 5 HKC 21, where the offences were of similar nature involving false and fictitious sales in the prospectus as well as making false statement, attracted a penalty of five years' imprisonment.

**[26]** In the Singapore case of *Public Prosecutor v. Wang Ziyi Able* [2008] 2 SLR 1082, the court made it clear that offences affecting the delivery of financial services and the integrity of economic structure must be met with deterrent sentence.

**[27]** Learned counsel highlighted to us the various decisions by the court which set a trend of fines sentences. These are cases involving the Suremax group of companies, and Granasia Corporation. We are not able to appreciate the issues involved in all these cases as they are unreported and the facts and circumstances may be different.

**[28]** In Malaysia, this court had affirmed a jail term of six months for one charge under s. 122B in *Ooi Boon Leong v. Public Prosecutor (supra)*. In that case two accused directors who were charged under s. 122B for authorising the furnishing of misleading statement in a consolidated income statements to Bursa Malaysia of a listed company, Mems Technology Bhd, showing a revenue of RM73.4 million, of which RM30 million of the sales were false.

**[29]** We agree with learned DPP that the learned trial judge had erred in attempting to distinguish the facts of the present appeal with *Ooi Boon Leong v. Public Prosecutor.* The Sessions Court in our view ought to have given due regard to the gravity of the offence and not comparing the amount of falsity involved *per se*. The falsity in this appeal had started with the IPO when the prospectus contained 97.1% falsity and was continued thereafter for a period of one year with a 93% falsity to Bursa Malaysia. On its percentage, the falsity in *Ooi Boon Leong* was only 41% as compared to 97.1% in the present

appeal *vis-à-vis* the prospectus and 93% in the statements to Bursa. In comparing the quantum involved *per se* without looking at the percentage and the seriousness of the matter involved, it would be disregarding the fact that each company carry on different business. At least the percentage of falsity would fairly demonstrate the extent and seriousness of the misrepresentation.

**[30]** Percentage of falsity apart, it must be noted the offences committed under s. 122B were related to false information made to Bursa Malaysia in four quarterly financial reports immediately after the listing of Inix. Quite plain from the facts, after creating a falsity starting with the IPO at 97.1% of the sales reported in its prospectus, the falsity continued thereafter for a period of one year. This time 93% of sales revenue reported was false.

**[31]** Instead of showing remorse, the respondents perpetuated the crime and had continued to display an appalling lack of commercial morality. It is clear from the facts that having gotten away with false prospectus and having achieved what they sought to achieve in terms of financial gain through the IPO based on the false prospectus, they became comfortable and perpetuated their crimes with total disregard for the authority and the law.

**[32]** It is also obvious that the respondents had to maintain the fictitious figure in consonant with the figure in the prospectus, because if the respondents were to show the real sales figures, it would have driven investors away from investing in Inix. We further note that one of the reasons in mitigation cited by learned counsel was the fact that the shares issued to the respondents were held in moratorium. We would not be wrong also to assume that by that reason that the shares were held in moratorium, the need to prop up the company's revenue in the way the respondents did, would become inevitable to maintain an appearance that the company was doing well *albeit* at the expense of the investors.

**[33]** What would have been an important consideration in determining the sentence in this case was the planning and pre-meditation involved in the commission of the crime. The scheme started with creating false sales figures in the prospectus, which would have aided it for listing. Towards that end, the making of payments to cover up fictitious sales by all the three respondent directors showed that the offences were not committed at the spur of the moment. It was pre-meditated and calculated to deceive the public to part with their monies in the belief that they were making sound investment in a profitable company with a profit of RM2.448 million for the financial year 31 January 2005 when in fact the company was making a loss of RM5.084 million. This was not a case of an error of judgment but a deliberate effort to furnish false information. After the listing was approved, the plan perpetuated with further false reporting to Bursa.

**[34]** The Sessions Court did not take this factor into account and found that there was no planning or pre-meditation involved, which clearly was not the case. In *Public Prosecutor v. Loo Chang Hock* [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263; [1988] 1 MLJ 316 it was held that a deterrent sentence was appropriate where there was a clear pre-meditation. The Sessions Court Judge in our view was in error to find that there was no pre-meditation and planning on the facts of this case.

**[35]** We further note the respective roles played by the respondents in the perpetration of this crime. The fourth respondent was an executive director and Chief Executive Officer of Inix, the second respondent was an Executive Director and Chief Technical Officer, and the first respondent was a non-executive director. They were responsible under the law to ensure correct and accurate information are contained in the prospectus and that the reports to Bursa are accurate. The third respondent was Senior Accounts Executive in the company. Though not a director, the third respondent was in charge of the financial matter of the company and had assisted to fabricate the fictitious sales as well as the false figures in the financial reports.

**[36]** Besides looking at the financial benefits obtained, the sentence imposed must also be in tandem with the respective roles played by the respondents. The responsibilities of directors under the law are onerous. Directors are not appointed to advance their own interests but to manage the company for the benefit of its shareholders to whom they owe a fiduciary duty. The third respondent was an employee who would no doubt had to take instructions from the CEO but she was very much aware of the wrongdoing, and yet participated in the same.

**[37]** We find the learned Sessions Court Judge had also erred in giving consideration to the role of the advisers in meting out the sentences on the respondents. In his written submission, learned counsel for the respondents had also mentioned the role of advisers in relation to the listing exercise. However, there was no evidence on the role played by the advisers in the commission of the crime in question. Even if those facts stated in the submission were true, the advisers' role would have ceased upon listing. The submission to Bursa after the listing could no longer be attributed to the advisers. Thus, the consideration given on the role of advisers was misplaced.

**[38]** The other issue raised by the respondents was on the construction of the provisions on sentencing. In construing the sentence spelt out in both s. 55(3) of the SCA and s. 122B of the SIA, we agree with the submission by Dato' Kumaraendran for the first respondent that custodial sentence is not mandatory under these provisions. However, upon our plain reading of these provisions, we are of the view that the court is vested with the necessary discretion to pass sentences of either fines or imprisonment or both as

mandated by the provisions, though not necessarily in that order. Learned counsel cited *Leong Kok Huat v. PP* [1998] 4 CLJ 106 in support of his contention that since the Legislature had stipulated the sentence of fine first, it has to be given priority. We do not agree. In our view, *Leong Kok Huat v. PP* in fact reinforces the discretion given to the court in what would be the appropriate sentence on the facts and circumstances of each particular case.

**[39]** In *Lim Guan Eng v. Public Prosecutor & Other Appeals* [1998] 3 CLJ 769; [1998] 3 MLJ 14 the Court of Appeal had substituted the sentences of fines with imprisonment despite the provisions of the Sedition Act 1948 being worded in similar vein, that is, it provides for fines and followed by imprisonment. It follows that even if the sentence of fines is to be given priority, in line with the principles of sentencing the court is free to impose either or both. We find it obvious that, these provisions of the law give full discretion to the court to impose either sentences of fines or imprisonment or both when the circumstances merit. Thus we find no merits in the argument put forth by learned counsel.

**[40]** The crime of misleading the public and the Bursa Malaysia cannot be measured in dollars and cents as the damage that would ensue is indeed immeasurable. It has wider ramifications and repercussions on market confidence than offences against a person, which by and large is limited in consequence.

**[41]** A deterrent sentence must aim to deter potential offenders by making example of an offender. Fines often fail to be an effective deterrence and studies have shown that the most feared punishment is imprisonment (see *PP v. Wang Ziyi Able* (*supra*)). A deterrent sentence is necessary to maintain the integrity of the financial market, which hinges on an accurate and truthful disclosure of information. No room should be available for false information because in the current disclosure-based regime, the burden of maintaining market integrity rests with market participants.

**[42]** Thus for all the reasons above, we agree with the learned DPP that the sentences imposed by the learned Sessions Court Judge on all the respondents, which were affirmed by the High Court, were manifestly inadequate and did not drive home the point of seriousness and would have no deterrent effect. Having regard to the serious nature of the offence and the need for general deterrence and after striking the balance between public interest and the interests of the respondents, no sentence other than imprisonment would be appropriate.

**[43]** We would be failing in our duties if we do not pass sentences which would make it absolutely clear and plain that those who indulge in these kinds of conduct would receive severe punishment. A deterrent sentence should serve as a warning to others not to partake in similar offences.

**[44]** Premised on the above reasons, we allow the appeal of the learned DPP. For the offence under s. 55 of the SCA, we note the proportion of fines which the Sessions Court had imposed on all the respondents. The first and second respondents were both fined in the sum of RM125,00 each while the third respondent was fined RM150,000 and the fourth respondent RM1,100,000. The learned trial judge must have imposed these fines in tandem with the monetary benefits obtained from the IPO stated in para. 21 above. We had earlier stated that this offence should not be viewed from the monetary gains *per se*. The roles played by the respective respondents are equally important factor in sentencing. In our considered view the roles played by the first, second and the third respondents had to be distinguished from that of the fourth respondent who obviously master minded the whole scheme. We do not agree that the third respondent should be given a higher sentence of imprisonment though the Sessions Court had imposed slightly higher fines on her than the first and second respondents. Her role and responsibility cannot be more or higher than any of the directors. In our view she was a mere employee but a willing participant in the crime.

**[45]** Before we proceeded to pronounce the custodial sentence to be imposed on all the respondents, we had allowed learned counsel for the first, third and fourth respondent to plea for mitigation. Dato' Kumaraendran learned counsel for the first respondent had graciously mitigated on behalf of the second respondent who was not represented by a counsel. The mitigating factors raised on behalf of all the respondents relate to their personal matters, such as their ages, the prospect of losing jobs and the plight of their dependants. We have given our due consideration to all of them.

**[46]** In the circumstances, we vary the sentence imposed on all the respondents pursuant to s. 55(3) of the SCA in the following terms:

(i) the first respondent, Mok Chin Fan, the second respondent, Cheong Kok Yai, and the third respondent Normah binti Sapar we hereby sentence them to an imprisonment sentence of six months each in addition to the fines imposed by the Sessions Court on each of these respondents.

(ii) the fourth respondent, Jimmy Tok Soon Guan, we hereby sentence him to an imprisonment of nine months in addition to the fines imposed by the Sessions Court.

**[47]** On the four charges under s. 122B of the SIA on the respondents, following the reasons and consideration we have earlier alluded to above, we vary the sentences imposed by the Sessions Court in the following terms:

(i) The first respondent Mok Chin Fan, the second respondent Cheong Kok Yai, and the third respondent Normah binti Sapar, we hereby sentence them each to an imprisonment sentence of six months on each of the four charges, in addition to the fines imposed by the Sessions Court on each of them;

(ii) The fourth respondent, Jimmy Tok Soon Guan, we hereby sentence him to an imprisonment sentence of nine months in addition to the fines imposed by the Sessions Court on each of the four charges; and

(iii) The sentence of imprisonment for all the four charges on all the four respondents shall run concurrently.

**[48]** The imprisonment sentences on all the respondents under s. 55 of the SCA and s. 122B SIA shall run consecutively. The sentences of imprisonment shall take effect from today. An order of committal be issued on all the first, second, third and fourth respondents respectively.

We hereby order so.